

SECTION 1

RULEMAKING IN GENERAL

WHAT IS A RULE?

A rule is an agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of an agency. Rule includes prescribing fees or the amendment or repeal of a prior rule but does not include intra-agency memoranda that are not delegation agreements. A.R.S. § 41-1002(12).

WHY DO WE NEED RULES?

1. Rules implement legislative policy. Usually, the Legislature establishes broad policy and general standards for the operation of a program. The Legislature may lack the expertise to determine how a program should run. The Legislature grants authority to an agency to define these details in accordance with the broad statutory guidelines.

EXAMPLE:

A.R.S. § 8-126 requires the Department of Economic Security (DES) to promulgate rules for licensing adoption agencies and for the form and content of investigations, reports, and studies concerning adoption placement. DES must define the requirements for licensure as an adoption agency: how to apply to become licensed; how often a license must be renewed; what procedures an agency must follow to renew a license; what circumstances will lead to suspension or revocation of a license; and what hearings or appeals are available to an agency to challenge disciplinary action. The rules also prescribe the requirements for certification of prospective adoptive parents, certification studies, placement investigations, and placement reports.

2. Rules tell the public how to do or get something, or what can happen if something isn't done.

EXAMPLE:

A.R.S. §§ 5-525 and 42-133 give DES the right to collect debts owed to DES by the setoff of the debtor's lottery winnings or income tax refund. DES has a rule that tells debtors how to protest the setoff: what papers to file, with whom to file them, the number of days in which the debtor must file the protest, etc. The rule also provides that the setoff will become final if the debtor doesn't protest the setoff. (See A.A.C. R6-1-201 and R6-1-202)

3. Rules set standards and limits for the exercise of discretion so that an agency gives equal treatment to persons who are similarly situated.

EXAMPLE:

The DES child care rules allow DES to revoke a child care provider's certificate if the provider fails to accept DES-referred children on three consecutive occasions. This rule ensures that the certification specialist does not revoke one provider's certificate for three refusals and another provider's certificate for five refusals. (See A.A.C. R6-5-5207(E))

WHAT ARE THE LIMITS ON AN AGENCY'S RULEMAKING POWERS?

1. An agency can adopt rules only if the Legislature gives the agency the power to do so. That power can be general or specific.

EXAMPLE:

(General authority) A.R.S. § 41-1952 establishes the Arizona Department of Economic Security. A.R.S. § 41-1954 contains a long list of powers and duties that the Legislature has conferred on DES, including the power to “[a]dopt rules [DES] deems necessary to further the objectives and programs of the department.”

EXAMPLE:

(Specific authority) A.R.S. § 41-1992 specifies certain basic requirements for hearings and appeals of DES decisions. DES is required to “prescribe by regulation procedures for implementing the provisions of this section.”

2. The statutory authority conferred by the Legislature always sets the boundaries of the agency’s rulemaking authority. Agency rules must be consistent with, and cannot exceed or diminish, the statutory authority granted to the agency. Rules must also be consistent with the standards reflected in the legislative or congressional intent being implemented by rule.

EXAMPLE:

A.R.S. § 41-1993(B) allows persons aggrieved by a decision of the DES Appeals Board to appeal that decision to the Arizona Court of Appeals by filing “an application for appeal . . . within thirty days of the date of mailing of the decision upon review.” The appeal time is fixed by statute. DES could not adopt a rule giving parties 45 days to file the appeal because a longer time frame would be inconsistent with the statute. Similarly, DES could not adopt a rule requiring parties to file an appeal within 14 days. A more restrictive rule would also be inconsistent with legislative intent.

WHAT DOESN’T BELONG IN RULES?

1. A statement of purpose, goals or objectives which tends to be explanatory rather than regulatory. (You may, however, include these statements in the preamble (a part of the Notice of Rulemaking activity.))
2. A statement of, or citation to, statutory authority – although cross-references are allowed.

EXAMPLES:

DON’T WRITE: Any person may petition an agency for the adoption of a rule. (A.R.S. § 41-1033)
Any person who wants the agency to adopt a rule shall file a written petition with the agency’s director.

(This rule simply cites and paraphrases the statute.)

WRITE: To petition for rulemaking action, as provided in A.R.S. § 41-1033, a person shall file a written petition with the Department’s director. The petition shall specify the following . . .

(This rule provides guidance on which statute is the subject of the rule but does not unnecessarily repeat statutory language.)

3. Matters concerning “only the internal management of an agency” which do not “directly and substantially affect the procedural or substantive rights or duties of any segment of the public.” A.R.S. § 41-1005(A)(4).

EXAMPLES:

Directions to agency employees on how to request a reasonable accommodation under the Americans With Disabilities Act;

Directions to agency employees on how to grieve employee performance evaluations; and

Directions to agency employees on the use of copy machines, fax machines, and telephones.

4. Matters specifically exempted by A.R.S. § 41-1005(A).

HOW DO YOU DETERMINE WHEN YOU NEED A RULE AND WHEN YOU CAN PUT SOMETHING IN A POLICY? _____

1. Examine your statutory authority. Sometimes the Legislature will mandate that an agency promulgate rules covering a particular subject.

EXAMPLES:

The division shall establish rules for licensing agencies, including professional licensing, and suspending, revoking and denying licenses.

The director shall adopt rules with respect to the time in which a recipient must notify the department of a change in circumstances affecting the recipient's eligibility.

2. Without a statutory mandate, there is not always a clear-cut line to tell you when something belongs in a rule and when something belongs in a policy manual. Ask yourself whether this requirement will bind only personnel within the agency, or will it bind the outside world? Will the agency use this rule to make distinctions in treatment? (Who is eligible for benefits and who is not? Who is subject to penalty and who is not? Who must comply and who is exempt?) If the answer is yes, the requirement belongs in a rule.
3. If the requirement will merely spell out internal procedures, such as advising an employee how to process an internal form or which supervisor to consult in a particular circumstance, the requirement or process does not belong in a rule.
4. Any requirement or interpretive opinion that directly and substantially affects the public should be in a rule. Agencies have been successfully sued for relying on policies to control matters that should properly be placed in rules.

PUBLISHING NOTICE OF SUBSTANTIVE POLICY STATEMENTS AND GUIDANCE DOCUMENTS _____

1. The Administrative Procedure Act (APA) requires the Secretary of State's office to publish summaries of "substantive policy statements" and "guidance document publications" in the *Register*. A.R.S. § 41-1013(B)(14). A "substantive policy statement" is a "written expression" that explains the agency's "current approach to, or opinion of," a constitutional, statutory or regulatory requirement or a judicial or administrative decision, or the agency's practices and procedures regarding such a requirement or decision. A.R.S. § 41-1001(20).
2. The APA requires an agency to submit summaries of substantive policy statements to the Secretary of State for publication. A.R.S. § 41-1091(A). An agency must also publish a directory summarizing its rules and policy statements. A.R.S. § 41-1091(B). Although the APA does not penalize an agency for failing to do so, the agency should make a good faith effort to abide by these requirements and notify the public of such documents.

THE REVIEW PROCESS _____

Once your agency has determined who will be reviewing the rule, be certain that the reviewer is (or the reviewers are) involved in the entire rule process. Also assess who may be interested in the rule. Determine whether the agency will involve those interested and, if so, at which stages of the process. Rules become law upon their effective date, at which time the agency becomes bound by the rules.

APA REQUIREMENTS

Rather than mandating public participation in the rulemaking process, the APA creates opportunities for public involvement in that process. The burden then falls on the public to take advantage of those opportunities. Opportunities are created through the notice and comment process.

1. The APA requires the agency to tell the public that the agency has begun work on a particular rule by publishing a notice of rulemaking docket opening in the *Register*. A.R.S. § 41-1021(C).

2. After the agency has drafted the rule and is ready to begin the process of promulgating the rule into law, the agency must tell the public what the rule says and what economic impact the rule is likely to have, by publishing a notice and the text of the proposed rule in the *Register*. A.R.S. § 41-1022(A).
3. The agency must provide copies of rulemaking documents to members of the public who request them. A.R.S. § 38-121.
4. The agency must maintain an official rulemaking record and make it available for public inspection. A.R.S. § 41-1029.
5. The agency must allow at least 30 days after publication of the proposed rule for public comment before closing the record. A.R.S. §§ 41-1022(C) and 41-1023(B).
6. The agency is required to conduct an oral proceeding (public hearing) on a proposed rule if five or more people request one. When the agency schedules an oral proceeding, the agency must give the public 30 days' notice of the scheduled proceeding. A.R.S. § 41-1023.
7. Public comment is allowed at the Governor's Regulatory Review Council hearings within the parameters of A.R.S. § 41-1052(C) and (E).

INTERNAL AGENCY REVIEW AND EVALUATION

1. Assess what effect the rule will have on the regulated public and whether it will be controversial. Determine the extent of public participation and resolve any controversy at the beginning of the process. An agency should request a review by its agency attorney or assistant Attorney General at this point.
2. Establish an agency internal review process to evaluate the substance and legal accuracy of the rule.
3. The review process should also evaluate how well the rule communicates or how readable it is.
 - a. Evaluate whether the rule is clear, concise, and understandable. Make sure the sentences are short. To the extent possible, avoid words of more than three syllables. The bibliography in Section 12 of this manual contains information for determining readability, and computer software is available that calculates the "readability index" of a written document.
 - b. Determine whether the headings are helpful and the wording is clear and understandable. Don't rely on the headings to convey meaning. Because the heading is not legally part of the rule, the rule must stand alone.
 - c. Give reviewers a set of questions to answer from the rules and ask the reviewers how easy or difficult the rule is to use and understand.
 - d. Rewrite or reorganize a rule if any part is ambiguous, too specialized, or requires more knowledge of the subject matter than is possessed by the intended audience.

INTER-AGENCY REVIEW

When a rule affects more than one agency, the promulgating agency should ask each affected agency to review the rule and comment on it. These reviews can eliminate overlaps or conflicts, assess cumulative impacts, and shape priorities.

STAKEHOLDER AND PUBLIC REVIEW

Each agency determines the process it will use to obtain public involvement and comments. Some considerations relating to public involvement include the following:

1. Assume interest, not disinterest, regardless of how far from the "heart" of the process some segments of the public appear to be. Many government agencies think *only* of forming an advisory committee, or *only* of holding a hearing. The tendency to use only these techniques reflects a failure to clarify who needs to be involved. There is no single public, but different levels of public based on differing levels of interest and ability. Agencies that offer "one-size-fits-all" opportunities for public participation may find themselves dissatisfied with the content of that effort and will leave most of the public feeling frustrated by or discounted in the public decision-making process.

- a. Reviewers may say little or nothing to the rulemaking staff. They may work only from the agency's public information releases or from agency responses to questions. They may be observing just for themselves, or they may be reporting their observations to other units of government, to public interest groups, or to special interest organizations. When agencies cut down a mailing list to weed out those who do not seem to be actively involved, they demolish this area of participation.
 - b. Reviewers may work by mail or telephone. If an agency wants a large number of public reviewers, it must increase its efforts enough to formulate questions and develop a response format that allows reviewers to participate at their own convenience. In responding, participants may commit to recording their opinions.
 - c. There are some people for whom the decision is so important that their willingness to be involved goes beyond the effort of just replying to agency proposals or questions. For them, interest and knowledge make their direct involvement imperative in the rulemaking process.
 - d. Occasionally, an agency will give what amounts to a veto over a proposal to some people for whom the impacts of a decision are very great. A positive form of review involves the public in cooperative problem-solving and consensus-building.
2. Develop a comprehensive mailing list at the outset of the process. The idea is, up front, to cover as many bases as possible. Take into consideration those people who have chosen not to become involved but who are interested in the process and wish to be informed of what is going on.
 3. Accept the fact that, often on geographically diverse and/or controversial projects, varying groups will have different agendas. Repeatedly bringing these groups together for mass public meetings will deteriorate into unproductive "soap-boxing," not listening, learning, or true participation. Acknowledging these agendas, if they exist, is more effective. You may want to consider grouping people into committees by their particular interests, identifying specific issues, and bringing these issues together via representatives of each group. Be sure to have a mechanism in place to publicize every group's concerns and to respond to and publicize responses to those concerns.
 4. Establish and maintain as many strategically located repositories for rulemaking documents as can be managed. In theory, all members of the interested public should have reasonable access to the information.

ADDITIONAL AGENCY PROCEDURES

Although the burden falls on the public to take advantage of the opportunities created by the APA, the agency can take affirmative steps to involve the interested public in its rulemaking activities. Public involvement can begin at the preliminary drafting stage and extend through the entire rulemaking process. Getting consensus before beginning to write rules makes the writer's task easier and saves an enormous amount of time and frustration later on.

1. The agency may choose to have broad-based workgroups of internal and external stakeholders draft a set of rules. The more stakeholders, clients, and customers the agency involves in drafting the rules, the greater degree of "buy in" the agency is likely to have in the final product. At the same time, the difficulty and length of the drafting process increases in proportion to the number of people involved.

EXAMPLE: When DES decided to update its foster homes licensing rules, DES assembled a large workgroup to draft the rules. The workgroup included: people who must apply the rules (internal licensing staff), the people regulated by the rules (foster parents), the people protected by the rules (foster children), and other people who interact with these groups (the Attorney General's office, the Department of Health Services, and the Administrative Office of the Courts.)

2. The agency may solicit comments on the rules, either before or after publishing the proposed rules. The agency may wish to identify affected stakeholders, send those stakeholders a set of draft rules (regardless of whether the stakeholders have asked for copies), and ask for comment.

EXAMPLE: When DES promulgates rules involving welfare benefit programs, DES sends copies of the rules to law school legal clinics and legal aid organizations throughout the state and requests comment. These groups rarely participate in drafting the rules; however, they welcome the opportunity to comment. They represent the interests of welfare beneficiaries who may lack the legal expertise to comment for themselves.

3. Some agencies have existing mechanisms for informing their interested public that rulemaking is occurring.

EXAMPLES:

The DES Division of Developmental Disabilities publishes a monthly newsletter, which is distributed to providers, advocates, families, and clients. Any news about rulemaking activity, including the dates and locations of public hearings, is included in that newsletter.

The Arizona Department of Environmental Quality publishes a monthly “Rulesletter” which DEQ mails to interested members of the public.

4. The degree of public participation the agency may wish to invite will vary with the circumstances of the rule-making. Are time pressures involved? Are the rules likely to be controversial?

The benefits of obtaining public comment include:

- a. Saving time and effort. The agency runs a risk if it passively waits for the public to “take the initiative” to comment on the rules. Interested members of the public may wait until rule implementation appears imminent to make their comments. If comments made at a Council meeting or public hearing result in “substantial changes” to the rules, the agency must again notice the rules and open the public comment period again, which delays the rulemaking. By involving affected members of the public early in the drafting process, the agency may avoid problems and delay further down the road.
- b. Obtaining Council approval. The agency can potentially use these voluntary efforts to its advantage in proceedings before the Council. The Council is more likely to approve a rule that is the product of negotiation and compromise between the agency and its stakeholders.

EXAMPLE:

DES used a stakeholder committee composed of internal staff, advocates, clients, and providers to draft a set of certification standards for persons providing in-home services to persons with developmental disabilities. Members of that group volunteered to appear at the Council meeting and to send letters to the Council supporting the proposed rules.

- c. Broadening an agency’s perspective. An agency may lack a full perspective on the rules and not be aware that certain regulatory requirements are burdensome, costly, or unworkable to the people who must live with them. Rules that are clear to agency staff may not be clear to members of the public who refer to them infrequently.

REGULAR RULEMAKING PROCESS

Docket Notice must be published in the *Register*.

Notice of meetings may be published in the *Register*.

Oral proceeding (hearing) is held no sooner than 30 days after the proposed rule is published in the *Register*.

Rule must be adopted or terminated within 120 days after the close of the record.

G.R.R.C. has 90 days to review and approve or return the adopted rule or EIS

After approval by G.R.R.C., the rule becomes effective upon filing with the Secretary of State who date- and time-stamps the rule.



